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**Intestacy, Dependency, and Social Security, *Oh My!*
An In-Depth Look At Posthumously Conceived Children’s Right To Child’s Insurance
Benefits Under the Social Security Act**

By: Mario S. Russo

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I. Introduction

It is estimated that in the year 2011 alone, 822,300 American males were diagnosed with some form of cancer.¹ While cancer treatment undoubtedly has improved, achieving higher success rates for cancer patients, such treatment often yields its own set of health-related risks.² For instance, chemotherapy and radiation—two widely-prescribed forms of cancer treatment—commonly cause damage to sex organs and, consequently, sterility in men.³ As a result, many men undergoing such treatment, who wish to later have the ability to father a child, often elect to bank, or store, their sperm before treatment begins.⁴ This practice offers sterile cancer survivors a viable and often equally-effective alternative for fathering a child, and allows many couples to fulfill their dream of starting a family. However, in the unfortunate case where treatment is ineffective, and the male cancer patient does not survive, the use of his stored sperm to posthumously conceive a child can raise a host of legal issues. One such issue, which, until recently, had divided the United States Courts of Appeal, involves the right of posthumously conceived children, or lack thereof, to collect child's insurance benefits under the Social Security Act.

The Social Security Act (or “the Act”), among other things, authorizes the payment of insurance benefits to dependent children of deceased wage-earners.⁵ However, because the Act fails to make clear the rights of children conceived posthumously,⁶ circuit courts addressing the issue had interpreted the Act and determined benefit eligibility inconsistently, leaving posthumously conceived children entirely dependent on a particular court's interpretation.

¹ American Cancer Society, *Cancer Facts & Figures 2011*, AM. CANCER SOC'Y 4, 10 (2011), <http://www.cancer.org/acs/groups/content/@epidemiologysurveillance/documents/document/acspc-029771.pdf>.

² Reshma L. Mahtani, *Male Sterility*, CARING4CANCER (Aug. 15, 2010), <https://www.caring4cancer.com/go/cancer/effects/lesscommon/sterility.htm>.

³ *Id.*

⁴ *Id.*

⁵ *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

⁶ *Gillett-Netting v. Barnhart*, 371 F.3d 593, 595–96 (9th Cir. 2004).

Perhaps surprisingly, much of the dispute dividing the courts had centered around the issue of whether posthumously conceived children are considered “children” for purposes of benefit eligibility and how that determination should be made.

While the United States Supreme Court has now resolved this question,⁷ the circuit courts that previously had addressed the issue generally adopted one of two positions. The Fourth and Eighth Circuits had held that, pursuant to 42 U.S.C. § 416(h)(2)(A)–(B) and (h)(3), posthumously conceived children must be able to inherit from the decedent under state intestacy law, or satisfy certain exceptions to that requirement, in order to qualify as “children” for insurance benefit purposes.⁸ The Third and Ninth Circuits, on the other hand, had interpreted the statute broadly, taking the position that a couple’s undisputed natural children plainly fall within 42 U.S.C. § 416(e)(1)’s basic definition of “child,” thereby making the children eligible for child’s insurance benefits and their state intestacy rights irrelevant.⁹

The issue of posthumously conceived children’s rights to child’s insurance benefits under the Social Security Act undoubtedly will become more and more relevant as reproductive technologies further advance and the number of children conceived posthumously continues to grow. Notwithstanding the Supreme Court’s resolution of the matter, this Comment articulates several reasons why, as a matter of statutory interpretation, the Supreme Court was correct in aligning with the Fourth and Eighth Circuits and interpreting the Social Security Act—at least as it is currently written—narrowly, thus allowing posthumously conceived children to qualify for child’s insurance benefits only if they can inherit from the deceased wage-earner under state intestacy law. The Comment, however, goes on to suggest that, while perhaps consistent with

⁷ See *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

⁸ *Schafer v. Astrue*, 641 F.3d 49, 50–51 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

⁹ *Id.*

principles of statutory interpretation, the current text of the statute is inconsistent with the legislative purpose underlying the Act's passage.

Part II of this Comment will provide an overview of modern reproductive technologies and posthumous conception. Part III will discuss the Social Security Act, its history, and child's insurance benefits under the Act. Part IV will discuss the recently resolved circuit split regarding the issue of whether posthumously conceived children are entitled to child's insurance benefits under the statute. Part V will address why, pursuant to principles of statutory interpretation, the Fourth and Eighth Circuits' interpretation of the Act, at least as it is currently written, *correctly* required courts to look to state intestacy law when determining an applicant's "child" status for purposes of benefit eligibility. Part VI will discuss the recent Supreme Court decision that resolved the circuit split over the issue of posthumously conceived children's right to child's insurance benefits. Part VII will argue that although the Act, as it is currently written, has been construed correctly by the Supreme Court and Fourth and Eighth Circuits, the statute is poorly drafted and fundamentally inconsistent with the legislative purpose underlying the Act's passage. Lastly, Part VII will propose a solution to this dilemma—namely that Congress revisit and amend the Social Security Act so that it both corresponds with the Act's legislative purpose and is clearer for courts tasked with interpreting it in the context of posthumously conceived children.

II. Assisted Reproductive Technologies and Posthumous Conception

Assisted reproductive technologies ("ART") have allowed many couples, who would otherwise be precluded from doing so, to have biological children.¹⁰ Transforming the way society views reproduction as well as the reproductive lives of many couples, these various

¹⁰ Emily Galpern, *Assisted Reproductive Technologies: Overview And Perspective Using A Reproductive Justice Framework*, CENTER FOR GENETICS AND SOC'Y, 1 (Dec. 2007), <http://geneticsandsociety.org/downloads/ART.pdf>.

technologies and techniques afford prospective parents not only the ability to have children, but also the ability to determine *when* they would like to have children.¹¹ For this reason, ART are often utilized by men and women that are either terminally ill or at risk of becoming infertile, such as cancer patients receiving chemotherapy or radiation treatment. Among other things, ART allow these men and women to retain their reproductive options post-treatment and even post-death.¹²

While ART encompasses a variety of technologies that promote pregnancy;¹³ the most common in the posthumous conception context are cryopreservation, artificial insemination, and in vitro fertilization.

a. Cryopreservation

Commentators largely agree that the availability of ART primarily is attributed to the development of a process known as cryopreservation.¹⁴ Cryopreservation is the “process of slowly freezing bodily materials so that they can be used at a future date.”¹⁵ In the ART context, the procedure generally involves sperm, ova, or embryos—all of which can be frozen for extended periods until needed.¹⁶ Cryopreservation of these reproductive cells provides prospective parents the ability and luxury of postponing the decision to conceive to some later, more convenient time.¹⁷

¹¹ Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor’s Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 257 (1999).

¹² Galpern, *supra* note 10, at 10.

¹³ Although this Comment will attempt to describe *some* of the many reproductive technologies available to prospective parents, an in-depth analysis of such technologies and techniques is beyond the scope of this paper.

¹⁴ Banks, *supra* note 11, at 257; John Doroghazi, *Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597, 1600–01 (2005).

¹⁵ Galpern, *supra* note 10, at 10.

¹⁶ *Id.* The cyropreservation of both sperm and embryos is a well-established practice. Sperm was first frozen in 1949, and it has been possible to freeze embryos since 1983. EMILY JACKSON, *REGULATING REPRODUCTION* 163–64 (2001).

¹⁷ Galpern, *supra* note 10, at 10.

Experts have determined that frozen sperm remains viable for at least ten years.¹⁸ Some experts believe it can remain viable for more than one-hundred years.¹⁹ As discussed in greater detail below, a man's frozen sperm can later be thawed and used for insemination or to fertilize ova in vitro.²⁰ For this reason, cryopreservation, when combined with reproductive procedures such as artificial insemination or in vitro fertilization, makes it possible for children to be conceived posthumously, i.e., after one (or both) biological parents is dead.²¹

b. Artificial Insemination

One of the earliest,²² simplest and least expensive techniques available to prospective parents is the process of artificial insemination ("AI"), which "refers to several different procedures, all of which involve inserting sperm into the female's body."²³ Although all such procedures fall under the umbrella of "artificial insemination," the processes differ with respect to whether sperm is placed in the woman's vagina, uterus, cervix or fallopian tubes.²⁴ While prospective couples may choose AI for a myriad of reasons, the practice is most frequently used "to combat male infertility,"²⁵ that is, AI is primarily utilized to assist in reproduction "when a man has stored some of his sperm prior to undergoing medical treatment, such as chemotherapy, that will render him infertile."²⁶

AI, which can be performed at home or in a more traditional medical setting, is regarded

¹⁸ Banks, *supra* note 11, at 270.

¹⁹ Doroghazi, *supra* note 14, at 1601 (citing Jamie Rowsell, *Stayin' Alive Postmortem Reproduction and Inheritance Rights*, 41 FAM. CT. REV. 400, 401 (2003)).

²⁰ SUSAN FRELICH APPLETON & D. KELLY WEISBERG, ADOPTION AND ASSISTED REPRODUCTION 267 (2009).

²¹ *Id.*

²² See Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 284 (Cal. Ct. App. 1993) (noting that the process of artificial insemination has been performed on animals for centuries).

²³ Galpern, *supra* note 10, at 9.

²⁴ *Id.*

²⁵ Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 549 (1996).

²⁶ JACKSON, *supra* note 16, at 164.

as a very simple procedure.²⁷ On average, seven insemination attempts over 4.4 menstrual cycles are required to initiate pregnancy.²⁸ To increase the couple's likelihood of success, sperm is typically "washed" before it is used, meaning it is separated from semen, dead or slow sperm, and/or any chemicals that may impair fertilization.²⁹ In all, approximately forty percent of artificially inseminated women become pregnant.³⁰

While AI is particularly successful—due to the fact that it “mimics what happens during coital reproduction”³¹—success rates can vary depending on various factors such as the age of the woman; the means by which the sperm is inseminated; whether the sperm is “washed” or “unwashed;” the overall quality of the sperm; and whether AI is used in conjunction with hormonal drugs.³²

c. In Vitro Fertilization

First successfully performed on a mouse ovum in 1958,³³ in vitro fertilization (“IVF”) offers couples a last-resort alternative to coital reproduction.³⁴ Because IVF tends to be highly invasive, women generally attempt other less-invasive methods of assisted reproduction before turning to IVF and related procedures.³⁵ Nevertheless, it is estimated that one percent of children in the U.S.—often referred to as “test tube babies”—are born using IVF.³⁶ The first IVF-produced child was Louise Brown, born in England in 1978.³⁷

Unlike AI, IVF typically involves fertilization of the human egg, or ova, *outside the*

²⁷ Galpern, *supra* note 10, at 9; Shah, *supra* note 25, at 549.

²⁸ Shah, *supra* note 25, at 549.

²⁹ Galpern, *supra* note 10, at 9.

³⁰ Shah, *supra* note 25, at 549 (citing Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 58 (1994)).

³¹ *Id.*

³² Galpern, *supra* note 10, at 9.

³³ JACKSON, *supra* note 16, at 167 (citation omitted).

³⁴ Shah, *supra* note 25, at 549.

³⁵ Galpern, *supra* note 10, at 9.

³⁶ *Id.*

³⁷ Shah, *supra* note 25, at 549.

woman's body.³⁸ Specifically, during the IVF procedure, eggs are produced either during the woman's natural menstrual cycle or with the assistance of a hormonal drug treatment, which stimulates egg production.³⁹ The eggs are then removed from the woman, either laparoscopically or through transvaginal aspiration, and placed in a culture that allows them to further mature.⁴⁰ After being mixed in a petri dish with either fresh sperm or thawed, cryogenetically frozen sperm, the eggs become fertilized.⁴¹ The fertilized ova—known as a preembryo—subsequently are inserted into either the woman's uterus, cervix or fallopian tubes, or are frozen via cryopreservation for future use.⁴² It is estimated that one-half of IVF patients freeze and store their pre-embryos.⁴³

Each of the above reproduction methods, as well as others outside the scope of this Comment,⁴⁴ has made posthumous conception possible. Regardless of the specific method employed, however, the legal status of a child conceived by artificial means after either one or both parents have died remains largely unsettled. Indeed, as noted above (and in further detail below) one important right at stake in the context of posthumous conception, until recently, had been posthumously conceived children's right to child's insurance benefits under the Social Security Act.

III. Overview of the Social Security Act and Child's Insurance Benefits

The following sections provide an abbreviated history of the Social Security Act and

³⁸ *Id.*; Galpern, *supra* note 10, at 9.

³⁹ Shah, *supra* note 25, at 549.

⁴⁰ *Id.* at 549–50; JACKSON, *supra* note 16, at 166.

⁴¹ Shah, *supra* note 25, at 550; JACKSON, *supra* note 16, at 166.

⁴² Shah, *supra* note 25, at 549; JACKSON, *supra* note 16, at 166.

⁴³ Shah, *supra* note 25, at 550.

⁴⁴ For example, gamete intrafallopian transfer—another variation of IVF where the woman's egg and a large number of sperm are placed directly into the woman's fallopian tubes rather than a petri dish. It has been said that “[b]ecause fertilization occurs naturally in the fallopian tubes . . . it is assumed that the tube is ‘a better incubator than a Petri dish’” Erica Howard-Potter, *Beyond Our Conception: A Look at Children Born Posthumously Through Reproductive Technology and New York Intestacy Law*, 14 BUFF. WOMEN'S L. J. 23, 28 (2006) (citation omitted).

child's insurance benefits.⁴⁵

a. An Overview of Social Security

In the midst of the Industrial Revolution and Great Depression, and under the leadership of President Franklin D. Roosevelt,⁴⁶ Congress enacted the Social Security Act in 1935.⁴⁷ The Act's purpose was to provide monthly benefit payments, i.e., old-age insurance, to workers who had reached a certain age and met other established criteria.⁴⁸ The Act, regarded as a "social insurance" program, "sought to address the long-range problem of economic security for the aged through a contributory system in which the workers . . . contributed to their own future retirement benefit[s] by making regular payments into a joint fund."⁴⁹

b. Child's Insurance Benefits

In 1939, Congress amended the Social Security Act.⁵⁰ Whereas the original Act provided only retirement benefits, and only to the primary worker,⁵¹ the 1939 Amendments added two new categories of benefits, one of which was "survivors benefits paid to the family in the event of the premature death of a covered worker."⁵² These fundamental additions, among other things, "transformed Social Security from a retirement program for workers into a *family-based*

⁴⁵ To some, the term "social security" encompasses "not only social insurance but also welfare programs generally." ARTHUR ABRAHAM & DAVID L. KOPELMAN, *FEDERAL SOCIAL SECURITY* 3 (1979). For those that subscribe to this interpretation, "social security" may include, among other things, "general assistance, old-age assistance, assistance to families with dependent children, public health programs, aid to the blind and disabled and vocational rehabilitation." *Id.* Throughout this Comment, however, the term "social security" will be limited in scope to social insurance programs, specifically survivor's insurance. Other programs that may reasonably fall under the "umbrella" of social security are, for the most part, outside the ambit of this paper.

⁴⁶ *Historical Background and Development of Social Security*, SOC. SECURITY ADMIN., <http://www.ssa.gov/history/briefhistory3.html> (last modified Jan. 10, 2013).

⁴⁷ *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

⁴⁸ ABRAHAM & KOPELMAN, *supra* note 45, at 3.

⁴⁹ *Historical Background and Development of Social Security*, *supra* note 46.

⁵⁰ *Beeler*, 651 F.3d at 957.

⁵¹ MARGARET C. JASPER, *SOCIAL SECURITY LAW* 5 (2d ed. 2004).

⁵² *Historical Background and Development of Social Security*, *supra* note 46. The term *family*, for these purposes, typically consists of the widows, children, and parents of the deceased worker. ABRAHAM & KOPELMAN, *supra* note 45, at 3.

economic security program.”⁵³

One particular provision of the 1939 Amendments, currently codified at 42 U.S.C. § 402(d), authorized the payment of “child’s insurance benefits” to the children of deceased workers. The purpose of these benefits was “not to provide general welfare benefits, but to ‘replace the support that the child would have received from his [parent] had the [parent] not died.’”⁵⁴

In order to be eligible for child’s insurance benefits today, a child must meet the criteria outlined in 42 U.S.C. § 402(d)(1).⁵⁵ Specifically, “the child or his guardian must have filed an application for child’s insurance benefits with the Social Security Administration.”⁵⁶ The child must also satisfy other substantive criteria: the child must be “unmarried and either under certain age limits or subject to a disability,” and must have been “dependent upon [the insured decedent] . . . at the time of [the decedent’s] death”⁵⁷ In a subsequent provision, the Act provides that “[a] child shall be deemed *dependent* upon [the insured decedent at the time of his death] unless, at such time, such individual was not living with or contributing to the support of such child” and either “such child is neither the legitimate nor adopted child of such individual,” or “such child has been adopted by some other individual.”⁵⁸

Before even reaching these inquiries, however, an applicant, as a threshold matter, must establish something more fundamental: that he or she is the insured’s “child” within the meaning

⁵³ *Historical Background and Development of Social Security*, *supra* note 46.

⁵⁴ *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 629 (3d Cir. 2011), *rev’d on other grounds sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012); *see also Mathews v. Lucas*, 427 U.S. 495, 507–08, 514–15 (1976); *Jones ex rel. Jones v. Chater*, 101 F.3d 509, 514 (7th Cir. 1996) (noting that “the purpose of federal child insurance benefits is not to benefit minor children as such but . . . to replace the support that the child would have received from his father had the father not died.”).

⁵⁵ *Beeler*, 651 F.3d at 957.

⁵⁶ *Schafer v. Astrue*, 641 F.3d 49, 51 (4th Cir. 2011) (citing 42 U.S.C. § 402(d)(1)(A)), *cert. denied*, 132 S. Ct. 2680 (2012).

⁵⁷ *Id.* at 51–52 (citing 42 U.S.C. § 402(d)(1)(B), (C)(ii)) (internal quotation marks omitted).

⁵⁸ 42 U.S.C. § 402(d)(3) (emphasis added).

of the Act.⁵⁹ The Act’s basic grant of benefits provides that “[e]very child (as defined in section 416(e) of this title) . . . of an individual who dies a fully or currently insured individual . . . shall be entitled to a child’s insurance benefit...”⁶⁰ In pertinent part, section 416(e) of the Act defines the term “child” as “the child or legally adopted child of an individual.”⁶¹ However, admittedly “sparse,”⁶² if not completely ambiguous, section 416(e)’s definition of child has, until recently, sparked much debate in the context posthumously conceived children’s right to benefits under the Act.

While some courts, such as the Third and Ninth Circuits, have found section 416(e) to provide a sufficient definition of “child” for purposes of determining benefit eligibility,⁶³ other courts, like the Fourth and Eighth Circuits, as well as the Commissioner of the Social Security Administration (“SSA”),⁶⁴ have determined that subsequent provisions of the Act “bear[] on the determination of child status.”⁶⁵

Section 416 of the Act, entitled “Additional definitions,” includes subsection 416(h), entitled “Determination of family status,” which states in pertinent part:

In determining whether an applicant is the *child* . . . of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to

⁵⁹ *Schafer*, 641 F.3d at 52.

⁶⁰ 42 U.S.C. § 402(d)(1).

⁶¹ *Id.* § 416(e)(1).

⁶² *Schafer*, 641 F.3d at 52.

⁶³ See *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011), *rev’d and remanded sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012); *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004).

⁶⁴ As is discussed in greater detail below, the Social Security Act gives the Commissioner of Social Security rulemaking authority. *Schafer*, 641 F.3d at 52; see also 42 U.S.C. § 405(a) (“The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.”)

⁶⁵ *Schafer*, 641 F.3d at 52.

taking intestate personal property as a child or parent shall be deemed such.⁶⁶

In light of section 416(h)(2)(A)'s intestacy requirement, the Commissioner of the SSA has interpreted the Act to provide that a child of a deceased wage earner is not entitled to benefits unless he or she has inheritance rights under state law or can satisfy certain additional statutory requirements.⁶⁷

For those children that cannot establish “child” status through section 416(h)(2)(A)'s intestacy provision, section 416(h) provides three additional gateways to benefits.⁶⁸ First, pursuant to section 416(h)(2)(B), an applicant who “is a son or daughter of a fully or currently insured individual,” but who cannot inherit from that individual under state intestacy law, is deemed a “child” if his or her parents went through a marriage ceremony resulting in a purported marriage that later turned out to be legally invalid.⁶⁹ Second, a child who is unable to inherit from a deceased insured under state intestacy law is nevertheless deemed a “child” under the Act if, prior to death the insured wage-earner, the wage-earner had acknowledged parentage in writing; had been decreed the child's parent by a court; or had “been ordered by a court to contribute to the support of the applicant because the applicant [was the insured individual's child].”⁷⁰ Third, a child who is barred from inheriting under state intestacy law is nevertheless deemed a “child” if the insured decedent is shown by “evidence satisfactory to the Commissioner of Social Security” to have been the parent of the applicant, and to have been “living with or contributing to the support of the applicant at the time such insured individual died.”⁷¹

⁶⁶ 42 U.S.C. § 416(h)(2)(A) (emphasis added).

⁶⁷ *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

⁶⁸ *Schafer*, 641 F.3d at 52.

⁶⁹ 42 U.S.C. § 416(h)(2)(B); *see also Schafer*, 641 F.3d at 52.

⁷⁰ *Id.* § 416(h)(3)(C)(i)(I)–(III) (internal subsection divisions omitted); *see also Schafer*, 641 F.3d at 52.

⁷¹ *Id.* § 416(h)(3)(C)(ii); *see also Schafer*, 641 F.3d at 52.

IV. Circuit Court Decisions Addressing Posthumously Conceived Children’s Right to Child’s Insurance Benefits under the Social Security Act.

As noted above, section 416(e)’s definition of *child* had created a divide among the United States Circuit Courts of Appeal, particularly in the context of posthumously conceived children’s right to child’s insurance benefits under the Act.

In *Gillett-Netting v. Barnhart*,⁷² for instance, the Ninth Circuit—the first circuit court to consider the issue—held, among other things, that the provisions under section 416(h) of the Act “do not come into play for the purposes of determining whether a claimant is the “child” of a deceased wage earner *unless parentage is in dispute*.”⁷³ In other words, where it can be shown that the claimant is the biological child of the deceased wage earner, i.e., that parentage is undisputed, the court need not look to section 416(h) or state intestacy laws to determine “child” status.⁷⁴

Similarly, in *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, the Third Circuit held that the provisions under section 416(h) are relevant only “where a claimant’s status as a deceased wage-earner’s child is in doubt,” and that the “term ‘child’ in § 416(e) requires no further definition when all parties agree” that the applicant is the “biological offspring” of the decedent.⁷⁵

In *Schafer v. Astrue*,⁷⁶ the Fourth Circuit took a different approach than the Ninth and Third Circuits. There, the court held that the SSA’s interpretation—that section 416(h) of the Act provides the analytical framework that *must* be followed in determining whether an applicant is a “child” for purposes of benefit eligibility—best reflects the Act’s history, text, structure, and purpose, and that “even if the agency’s interpretation were not the only reasonable one,” it is to

⁷² 371 F.3d 593 (9th Cir. 2004), *abrogated by* *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

⁷³ *Id.* at 595, 597 (emphasis added).

⁷⁴ *Id.* at 599.

⁷⁵ *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 631 (3d Cir. 2011), *rev’d and remanded sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

⁷⁶ 641 F.3d 49.

be accorded deference.⁷⁷

In *Beeler v. Astrue*,⁷⁸ the most recent circuit court case to address the issue, the Eighth Circuit similarly agreed with the SSA’s interpretation that “a natural child of the decedent is not entitled to benefits unless she has inheritance rights under state law or can satisfy certain additional statutory requirements.”⁷⁹ Like the Fourth Circuit, the court noted that the Commissioner’s interpretation was, “at a minimum, reasonable and entitled to deference.”⁸⁰ With respect to posthumously conceived children specifically, the court held that section 416(h)(2)(A) “clearly directs the Commissioner to determine the [child’s] status . . . by reference to state intestacy law.”⁸¹

We now turn to an in-depth discussion of these critical appellate decisions.

a. Ninth Circuit: *Gillett-Netting v. Barnhart*

In December 1994, Robert Netting (“Netting”) was diagnosed with cancer.⁸² Doctors informed Netting that chemotherapy might render him sterile.⁸³ As a result, prior to starting treatment, Netting decided to freeze and store his semen for later use by his wife, Rhonda Gillett-Netting (“Gillett-Netting”).⁸⁴

In February 1995, Netting lost his battle with cancer.⁸⁵ Prior to his death, however, Netting reiterated that he wanted his wife to have their child after his death using his frozen semen.⁸⁶ Using in vitro fertilization, Gillett-Netting gave birth to two children in August 1996.⁸⁷

⁷⁷ *Id.* at 51–52.

⁷⁸ 651 F.3d 954 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

⁷⁹ *Id.* at 956.

⁸⁰ *Id.*

⁸¹ *Id.* at 963.

⁸² *Gillett-Netting v. Barnhart*, 371 F.3d 593, 594 (9th Cir. 2004), *abrogated by* *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 595.

⁸⁷ *Id.*

Approximately two weeks after giving birth, Gillett-Netting, on behalf of her two children, filed an application for Social Security child's insurance benefits based on Netting's earnings.⁸⁸ The SSA denied the claim both initially and upon reconsideration, and Gillett-Netting subsequently filed a request for a hearing before an Administrative Law Judge ("ALJ").⁸⁹

Like the SSA, the ALJ denied Gillett-Netting's claim, finding that the children were not entitled to benefits because they "were not dependent on Netting at the time of his death."⁹⁰ Noting that the last possible time to determine whether one is dependent upon a wage-earner is the date of that wage-earner's death, the ALJ held that "children conceived after the wage earner's death cannot be deemed dependent on the wage earner."⁹¹ Gillett-Netting subsequently filed a complaint in district court, claiming that the decision to deny her children child's insurance benefits was not supported by substantial evidence, was not in accordance with the law, and denied them equal protection of the law.⁹²

Granting summary judgment in favor of the SSA, the district court held that Gillett-Netting's children did not qualify for child's insurance benefits because they were not Netting's "children" for purposes of the Act, and because they were not dependent upon Netting at the time of his death.⁹³ The district court also held that the SSA's denial of benefits did not violate the children's right to equal protection.⁹⁴ Gillett-Netting subsequently appealed to the United States Court of Appeals for the Ninth Circuit.⁹⁵

Recognizing that "no circuit court [had] previously considered the novel issue presented

⁸⁸ *Gillett-Netting*, 371 F.3d at 595.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (citing *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961, 965–69 (D. Ariz. 2002)).

⁹⁴ *Gillett-Netting*, 371 F.3d at 595.

⁹⁵ *Id.*

in [the] case,” the Ninth Circuit reviewed *de novo* the district court’s decision to deny child’s insurance benefits to Gillett-Netting’s children.⁹⁶ Stating that the Commissioner’s denial of benefits may be set aside “when the ALJ’s findings are based on legal error or are not supported by substantial evidence in the record,” the court began its analysis by noting that “[d]eveloping reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous conception.”⁹⁷ The court further pointed out that “[n]either the Social Security Act nor the Arizona family law that is relevant to determining whether [Gillett-Netting’s children] have a right to child’s insurance benefits makes clear the rights of children conceived posthumously.”⁹⁸

Turning first to the issue of whether Gillett-Netting’s posthumously conceived children were “children for purposes of the Act, the court recited the basic provisions of section 402(d)(1).⁹⁹ The court found that it was undisputed that Netting was fully insured when he died; that Gillett-Netting’s two children were Netting’s biological children as well as unmarried minors; and that Gillett-Netting had filed an application for insurance benefits on the children’s behalf.¹⁰⁰ The court then referenced section 416(e)’s definition of “child,” asserting that the Social Security Act defines the term “child” broadly.¹⁰¹ The court noted that “[c]ourts and the SSA have interpreted the word ‘child’ used in the definition of ‘child’ to mean the natural, or biological, child of the insured.”¹⁰² Rejecting the SSA Commissioner and district court’s assertion that the term “child” is further defined by sections 416(h)(2) and (3), the court held that those sections of the Act were added merely “to provide various ways in which children could be

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 595–96.

⁹⁹ *Id.* at 596.

¹⁰⁰ *Gillett-Netting*, 371 F.3d at 596.

¹⁰¹ *Id.*

¹⁰² *Id.*

entitled to benefits even if their parents were not married or their parentage was in dispute.”¹⁰³

The court also concluded that the provisions were irrelevant to the present issue because, while sections 416(h)(2) and (3) offer a means of establishing “child” status under the Act where the child’s parentage is disputed, “nothing in the statute suggests that a child must prove parentage under § 416(h) if [parentage] is not disputed.”¹⁰⁴

Thus, pointing out that the Commissioner had conceded that the children at issue were Netting’s biological children, and emphatically reiterating that the provisions under section 416(h) “do not come into play for the purposes of determining whether a claimant is the “child” of a deceased wage earner *unless parentage is in dispute*,” the Ninth Circuit concluded that the district court had erred when it held that Netting’s posthumously conceived children were not his “children” for purposes of the Act.¹⁰⁵

The court next turned to the issue of whether Gillett-Netting’s children, “the undisputed biological children of a deceased, insured individual, are statutorily deemed dependent on Netting without proof of actual dependency.”¹⁰⁶ The court noted that, under the Act, “a claimant must show dependency on an insured wage earner in order to be entitled to child’s insurance benefits.”¹⁰⁷ Agreeing with the district court that Netting’s posthumously conceived children were not in existence at the time of Netting’s death and, therefore, could not demonstrate *actual* dependency, the Ninth Circuit explained that “the Act statutorily *deems* broad categories of children to have been dependent on a deceased, insured parent without demonstrating *actual* dependency.”¹⁰⁸

Citing Supreme Court and Ninth Circuit precedent, as well as section 402(d)(3) of the

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 596–97 (emphasis added).

¹⁰⁵ *Id.* at 597 (emphasis added).

¹⁰⁶ *Gillett-Netting*, 371 F.3d at 597–98.

¹⁰⁷ *Id.* at 598 (citing 42 U.S.C. § 402(d)(1)).

¹⁰⁸ *Id.*

Act, the court noted, “[i]t is well-settled that all *legitimate* children *automatically* are considered to have been dependent on the insured individual, absent narrow circumstances not present in this case.”¹⁰⁹ The court added that illegitimate children who prove parentage under sections 416(h)(2) and (3) are similarly deemed to be the legitimate children of the insured decedent and, therefore, also are “deemed to have been dependent on the deceased wage earner.”¹¹⁰ The court subsequently proclaimed that the purpose of section 416(h) and its sub-provisions is not to prove parentage, but to prove dependency.¹¹¹ Adding that “the Act is construed liberally to ensure that children are provided for financially after the death of a parent” and that “[d]ependency is a broad concept under the Act,” the court concluded that “the vast majority of children are statutorily deemed dependent on their deceased parents” and that “only completely unacknowledged, illegitimate children must prove actual dependency in order to be entitled to child’s insurance benefits.”¹¹²

Turning to the facts of the case at bar, the court found that Gillett-Netting’s posthumously conceived children were “undisputedly Netting’s legitimate children under the law of the state in which they reside.”¹¹³ Explaining that Arizona had eliminated the status of illegitimacy, the court found that “[u]nder Arizona law, Netting would be treated as the natural parent of [Gillett-Netting’s children] and would have a legal obligation to support them if he were alive, although they were conceived using in-vitro fertilization, because he is their biological father and was married to the mother of the children.”¹¹⁴ The court added that, although Arizona law does not specifically address posthumously conceived children, *every* child in the state—which necessarily includes Gillett-Netting’s children—is the legitimate child of his or her natural

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Gillett-Netting*, 371 F.3d at 598.

¹¹³ *Id.*

¹¹⁴ *Id.* at 598–99 .

parents.¹¹⁵

While the court again rejected the Commissioner's contention that Gillett-Netting's children were not "legitimate children" and, therefore, could not be deemed "dependent" under section 402(d)(3) unless they also were able to inherit from the decedent under state intestacy law (or one of the other provisions of section 416(h)), the court did point out that its holdings would not apply "[i]f the sperm donor had not been married to the mother."¹¹⁶ Absent a marital relationship between the child's parents, the court said, "no eligibility for benefits would exist unless the Commissioner made a determination that the claimant was the dependent child of the deceased wage earner for purposes of the Act by virtue of satisfying one of the requirements in § 416(h)."¹¹⁷

Despite its qualified holding, however, the court reiterated that "[w]hile § 416(h) provides alternative avenues for children to be deemed legitimate, nothing in the Act suggests that a child who is legitimate under state law [must separately] prove legitimacy under the Act."¹¹⁸ The court observed that, as a practical matter, legitimate children typically will be able to inherit under state intestacy laws, but "they need not *demonstrate* their ability to do so in order to be entitled to child's insurance benefits."¹¹⁹ Opining that "[i]t would make little sense to require a child whose parents were *married* to demonstrate legitimacy by showing she meets a test set forth in § 416(h)," the court concluded that it need not consider whether Netting's children could be deemed "dependent" for some other reason, such as their ability to inherit from Netting under Arizona intestacy laws.¹²⁰

Having determined that the posthumously conceived children were Netting's legitimate

¹¹⁵ *Id.* at 599.

¹¹⁶ *Id.* at 599 & n.7.

¹¹⁷ *Id.* at 599 n.7.

¹¹⁸ *Gillett-Netting*, 371 F.3d at 599.

¹¹⁹ *Id.* at 599 n.8.

¹²⁰ *Id.* at 599 & n.8.

children under Arizona law and, therefore, were deemed dependent on Netting under section 402(d)(3) of the Act, the court held that the children were entitled to child's insurance benefits.¹²¹

b. Third Circuit: *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*

Robert Capato was diagnosed with esophageal cancer in August 1999.¹²² Soon thereafter, Mr. Capato was told that the chemotherapy he required might render him sterile.¹²³ Thus, Mr. Capato decided to freeze and store his sperm for future use so that he and his wife could retain their reproductive options post-treatment.¹²⁴

Mr. Capato's health began deteriorating in 2011, and he passed away in March 2002.¹²⁵ Shortly thereafter, Ms. Capato ("Capato") attempted in vitro fertilization using the stored, frozen sperm of her deceased husband.¹²⁶ The procedure was successful, and Capato gave birth to twins in September 2003—eighteen months after Mr. Capato's death.¹²⁷

The following month, Capato applied for child's social security insurance benefits on behalf of her twins.¹²⁸ The SSA, however, denied her claim.¹²⁹ Capato subsequently requested a hearing before an ALJ, which was held in May 2007.¹³⁰ But the ALJ also denied Capato's request for benefits.¹³¹

The ALJ found that Capato's twins, conceived after the death of their father, were "not for Social Security purposes the 'child(ren)' of the deceased wage earner . . . under Florida state law

¹²¹ *Id.* at 599.

¹²² *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626, 627 (3d Cir. 2011), *rev'd and remanded sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

¹²³ *Id.* at 627.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 628.

¹²⁷ *Id.*

¹²⁸ *Capato*, 631 F.3d at 628.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (internal citations omitted).

as required by section [4]16(h)(2)(A) of the Social Security Act” and, therefore, were not entitled to child’s insurance benefits under the Act.¹³² The district court affirmed the ALJ’s decision, and Capato subsequently appealed.¹³³

On appeal, the Third Circuit reviewed the district court’s decision to uphold the denial of benefits *de novo*.¹³⁴ Citing Third Circuit precedent, the court noted that “[w]here the ALJ’s findings of fact are supported by substantial evidence, we are bound by those findings, even if we would have decided the factual inquiry differently.”¹³⁵

Observing that the reproductive technologies at issue in the case “were not within the imagination, much less the contemplation, of Congress when the relevant sections of the [Social Security Act] came to be” and that “they present a host of difficult legal and even moral questions,”¹³⁶ the court began its analysis by noting that “[t]he purpose of ‘federal child insurance benefits’ is not to provide general welfare benefits, but to replace the support that the child would have received from his father had the father not died.”¹³⁷ The court further stated that “[t]he Act is to be accorded a liberal application in consonance with its remedial and humanitarian aims.”¹³⁸

After reciting the text of sections 416(h)(2) and (h)(3) and stating that 416(h)’s sub-provisions merely offer “*other ways* by which to determine whether an applicant is a ‘child’” for purposes of the Act, the Third Circuit rejected the provisions’ applicability to the case at bar.¹³⁹ The court explained, “Were we to determine that the § 416(h)(2)(A) definition of ‘child’ is appropriate here and go on to apply the law of intestacy of Florida, as the Commissioner argues

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Capato*, 631 F.3d at 628.

¹³⁵ *Id.* at 629 (citing *Fagnoli v. Massanari*, 247 F.3d 34, 38 (3d Cir. 2001)).

¹³⁶ *Id.* at 627, 629.

¹³⁷ *Id.* at 629 (internal quotation marks and citations omitted).

¹³⁸ *Id.* (internal quotation marks and citations omitted).

¹³⁹ *Id.* at 629–30.

we should, we would affirm [the denial of benefits].”¹⁴⁰ However, the court added that “neither the Commissioner nor the District Court, who agreed with the Commissioner, ha[d] told [the court] why, in the factual circumstances of this case, where there is no family status to determine, [the court should] even refer to § 416(h).”¹⁴¹

The court explained that to accept the Commissioner’s argument—that section 416(h) provides the analytical framework that courts *must* follow for determining whether a child is the insured’s “child” for purposes of benefits eligibility—“one would have to ignore the plain language of § 416(e) and find that the biological child of a married couple is not a ‘child’ within the meaning of § 402(d) unless that child can inherit under the intestacy laws of the domicile of the decedent.”¹⁴² Aligning itself with the Ninth Circuit, the court concluded that there was no reason for such an interpretation.¹⁴³

Pointing out that the Commissioner had conceded that Capato’s twins were her late husband’s biological children, the court cited *Gillett-Netting* for the proposition that section 416(h)’s sub-provisions have “no relevance for determining whether a claimant is the ‘child’ of the deceased wage earner where parentage is not in dispute.”¹⁴⁴ The court also noted that in response to *Gillett-Netting*, the Commissioner had issued an “Acquiescence Ruling,” limiting the application of *Gillett-Netting* to claims within the Ninth Circuit.¹⁴⁵ In a “Statement as to How *Gillett-Netting* Differs From SSA’s Interpretation of the Social Act,” contained in the Acquiescence Ruling, the Commissioner argued that “in all cases, § 416(h) provides the

¹⁴⁰ *Capato*, 631 F.3d at 630.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citations and internal quotation marks omitted)

¹⁴⁵ *Id.* An acquiescence ruling “explains how [the SSA] will apply a holding in a decision of a United States Court of Appeals that [it determines] conflicts with [its] interpretation of a provision of the Social Security Act or regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review.” *Id.* at 631 n.4.

analytical framework that [courts] must follow for determining whether a child is the insured's child for the purposes of section [416(e)]” and that section “416(h)(2)(A) directs the application of state intestacy law or the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C) to determine whether a child is a ‘child.’”¹⁴⁶ The Commissioner also asserted that “[a]n ‘after-conceived’ child . . . cannot satisfy the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C),” and, therefore, “to meet the definition of ‘child’ under the Act, an ‘after-conceived’ child must be able to inherit under State law.”¹⁴⁷

Rejecting the Commissioner’s argument that *all* children, “even including children of married parents whose parentage [is] not in dispute,” must satisfy “at least one of the provisions of section 416(h),” as well as the Commissioner’s justifications grounded in legislative history, the Third Circuit held that “[t]he plain language of §§ 402(d) and 416(e) provides a threshold basis for defining benefit eligibility” and that the provisions under section 416(h) are relevant only “where a claimant’s status as a deceased wage-earner’s child is in doubt.”¹⁴⁸ The court explained that a basic tenet of statutory construction “is that in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning.”¹⁴⁹ With respect to the Act, the court found that the “term ‘child’ in § 416(e) requires no further definition when all parties agree that the applicants here are the biological offspring of the Capatos.”¹⁵⁰ The court, however, limited its holding to the facts of the present case, stating “[w]e acknowledge that another factual scenario might render the Commissioner’s concerns more persuasive.”¹⁵¹

Emphatically concluding that the “undisputed biological children of a deceased wage

¹⁴⁶ *Capato*, 631 F.3d at 630–31 (internal quotation marks and citations omitted).

¹⁴⁷ *Id.* at 631 (citations omitted).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (internal quotation marks and citations omitted).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 631–32.

earner and his widow [are] ‘children’ within the meaning of the Act,” the court vacated the order of the district court in part and remanded for a determination of whether the children were dependent or deemed dependent on Mr. Capato at the time of his death.¹⁵²

c. Fourth Circuit: *Schafer v. Astrue*

Four months after Don Schafer Jr. married Janice in June 1992, he was diagnosed with cancer.¹⁵³ Like Mr. Netting and Mr. Capato, Mr. Schafer was told that the chemotherapy he required might render him sterile.¹⁵⁴ As a result, he deposited sperm with a long-term storage facility.¹⁵⁵ Mr. Schafer subsequently died of a heart attack in March 1993.¹⁵⁶

In April 1999, through the use of in vitro fertilization, Janice Schafer (“Schafer”) conceived a child.¹⁵⁷ She gave birth to that child in January 2000.¹⁵⁸ Although born approximately seven years after Mr. Schafer’s death, substantial evidence indicated that Mr. Schafer was the child’s biological father and that he intended for Schafer to use his stored sperm to conceive the child after his death.¹⁵⁹ Mr. Schafer, however, never expressed his consent to be the legal father of the posthumously conceived child in writing.

In 2004, Schafer, on behalf of her child, applied to the SSA for child’s insurance benefits under the Social Security Act.¹⁶⁰ The ALJ initially awarded Schafer’s child the benefits she requested; however, the SSA’s Appeals Council subsequently reversed the decision, finding that the child was not a “child” for purposes of the Act because he was unable to inherit from Mr.

¹⁵² *Capato*, 631 F.3d at 632. Because the district court had not reached the issue of dependency, given its conclusion that the definition of “child” was not satisfied, the court did not address the issue on appeal. *Id.* at 630 n.3.

¹⁵³ *Schafer v. Astrue*, 641 F.3d 49, 51 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Schafer*, 641 F.3d at 51.

¹⁶⁰ *Id.*

Schafer under Virginia intestacy law.¹⁶¹ The district court upheld the SSA’s denial of benefits, and Schafer appealed to the U.S. Court of Appeals for the Fourth Circuit.¹⁶²

On appeal, the Fourth Circuit—before establishing the various criteria of section 402(d)(1)—began by noting that an applicant seeking child’s insurance benefits under the Act must first establish something more fundamental: “that he is the insured’s ‘child’ within the meaning of the Act.”¹⁶³ Asserting that “Section 416(e)(1) . . . is not the only provision of the Act that bears on the determination of child status,” the court observed that the SSA “has always required applicants claiming natural child status—including the undisputed biological children of married parents—to pass through one of § 416(h)’s pathways to secure that status.”¹⁶⁴

The court subsequently summarized the parties arguments.¹⁶⁵ It noted that, under the SSA’s view, section 416(h) of the Act provides the “analytical framework” that must be followed in determining whether an applicant is a “child” for purposes of section 416(e)(1)’s definition.¹⁶⁶ Moreover, posthumously conceived children are entitled to benefits only if they can inherit under state intestacy law.¹⁶⁷ Thus, according to the SSA, Schafer’s child was entitled to child’s insurance benefits under the Act only if he could inherit from Mr. Schafer under Virginia intestacy law.¹⁶⁸ Because Virginia law “does not recognize any child born more than ten months after the death of a parent as that parent’s child for intestacy purposes,” the SSA denied Schafer’s claim.¹⁶⁹

Citing *Gillett-Netting*, Schafer claimed that section 416(h)’s provisions do not apply to

¹⁶¹ *Id.* Mr. Schafer had been domiciled in Virginia at the time of his death. *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 51–52.

¹⁶⁴ *Id.* at 52–53.

¹⁶⁵ *Schafer*, 641 F.3d at 52–53.

¹⁶⁶ *Id.* at 52.

¹⁶⁷ *Id.* at 53.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

children “whose parentage . . . is not disputed.”¹⁷⁰ Schafer explained that “§ 402(d) refers explicitly to § 416(e), not § 416(h), in defining ‘child.’”¹⁷¹ Thus, under Schafer’s view, § 416(e)(1)’s plain terms covered an undisputed biological child of the insured decedent and, therefore, her child’s ability to inherit from Mr. Schafer under Virginia intestacy law was irrelevant to determining his child status.¹⁷²

Addressing the parties “warring” interpretations, the court first engaged in a two-prong inquiry, derived from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).¹⁷³ The court first asked, as *Chevron* step one, “whether Congress has directly spoken to the precise question at issue.”¹⁷⁴ The court noted that if Congress has spoken directly to the precise question at issue, an agency “would not be free to counter Congress’s command, and the courts must uphold faithful interpretations and reject disobedient ones.”¹⁷⁵ However, the court added that “where a statute is silent or ambiguous with respect to the specific issue, a reviewing court at *Chevron* step two asks whether the agency’s answer is based on a permissible construction of the statute.”¹⁷⁶

With respect to *Chevron* step one, the court concluded that, while the plain language of the statute is “the most reliable indicator of congressional intent,” and “the plain meaning of ‘child’ in § 416(e)(1) might seem necessarily to include the biological children of those who, because of tragic circumstances, could only become parents after their death,” rejecting the SSA’s interpretation of the Act would be “unsound.”¹⁷⁷ The court reasoned that the “traditional

¹⁷⁰ *Id.* (internal quotation marks and citations omitted).

¹⁷¹ *Schafer*, 641 F.3d at 53.

¹⁷² *Id.*

¹⁷³ *Id.* at 53–54.

¹⁷⁴ *Id.* at 54 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)) (internal quotation marks omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (citation and internal quotation marks omitted).

¹⁷⁷ *Schafer*, 641 F.3d at 54 (citation and internal quotation marks omitted).

tools of statutory construction” demonstrated that Congress intended for the SSA to use state intestacy law for purposes of determining “child” status under the Act.¹⁷⁸ The court added that, even if Congress did not precisely speak to the question, “the SSA’s reasonable interpretation is entitled to deference”.¹⁷⁹

The court next examined the pertinent provisions of the Act.¹⁸⁰ Opining that “[s]ection 416(e) itself is notably brief,” and observing that other circuits had found that the section’s “definitional tautology does not provide much guidance as to how the SSA should go about making th[e] child status determination,” the court concluded that Congress intended the SSA to apply the Act as it always had—by applying state intestacy law to determine child status and benefit eligibility.¹⁸¹ Moreover, the court noted that the Ninth and Third Circuits “have been willing to elevate the *sparse* definition found in § 416(e)(1) and to completely de-emphasize the more extensive definition found in § 416(h)(2)(A), thereby treating Congress’s more comprehensive efforts as a mere afterthought.”¹⁸² In doing so, the court added, these circuits had overlooked Congress’ “plain and explicit instruction on how the determination of child status should be made”—by applying “such law as would be applied in determining the devolution of intestate personal property.”¹⁸³

Emphasizing that the term *child* “lies at the core of the Act’s benefit program,” the court commented that it would be “startling” if Congress had not provided “greater guidance on child status than set forth in § 416(e)(1).”¹⁸⁴ The court also stated that the *Gillett-Netting* and *Capato*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 54, 56.

¹⁸² *Id.* at 54 (emphasis added).

¹⁸³ *Schafer*, 641 F.3d at 54.

¹⁸⁴ *Id.* at 54–55.

courts' contentions could not be correct.¹⁸⁵ It reasoned that the Ninth and Third Circuits' argument—that “because ‘child’ ordinarily means ‘natural child,’ § 416(e)(1) independently provides child status to those children whose natural, or biological parentage is not disputed”—would “attribute inconsistent views about child status to . . . Congress.”¹⁸⁶ Observing that each sub-provision of section 416(h) requires an applicant for benefits to demonstrate *both* that the insured was the child’s biological parent *and* some additional condition, the court concluded that a showing of undisputed biological parentage could not be sufficient to establish child status under section 416(e)(1) because “it would have made no sense for Congress to require those whose parentage was initially disputed but was then resolved to prove something in addition to biological parentage.”¹⁸⁷ The court explained that Congress would not have imposed an additional proof requirement on the undisputed child of the insured if undisputed biological parentage were sufficient under section 416(e)(1).¹⁸⁸

The court also rejected the Ninth and Third Circuits’ attempt to add an additional requirement to section 416(e)(1). According to the court, “*Capato* and *Gillett–Netting* alternatively hint that the class of children independently provided child status by § 416(e)(1) is comprised of the undisputed biological children of *married* parents.”¹⁸⁹ The court responded by noting that “whatever their legal rights may be, out-of-wedlock children are indisputably the natural children of their biological parents under the ordinary English usage of the term.”¹⁹⁰ Therefore, the court said, “*Capato* and *Gillett–Netting* cannot state that § 416(e)(1) covers the children of only *married* couples without contradicting their earlier claim that § 416(e)(1)’s

¹⁸⁵ *Id.* at 55.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Schafer*, 641 F.3d at 55.

¹⁹⁰ *Id.*

supposedly obvious usage of ‘child’ meant all natural children.”¹⁹¹ The court also reiterated that section 416(h)(2)(A) contains no suggestion that it is limited to disputed or out-of-wedlock children.¹⁹² Instead, the provision “specifically addresses itself to the child status determination that must take place in evaluating *every* benefits application.”¹⁹³

Finding that the SSA’s interpretation of the Act followed “to the letter Congress’s explicit and precise instruction as to how the agency should determine child status” and “makes sense of the statute as a whole” rather than “focusing myopically on a single term,” the Fourth Circuit held that the SSA’s view was “dutiful and faithful to Congress’s intent.”¹⁹⁴

The court also concluded that the SSA’s interpretation was consistent with the Act’s legislative history and Congress’ wishes, noting, among other things, that some version of section 416(h)(2)(A) has always been included in the Act’s statutory scheme—thus “weakening any inference that it is just a new way for disputed children to gain child status.”¹⁹⁵ The court observed that a detailed look at the Act’s legislative history reveals that Congress viewed section 416(h)(2)(A)’s intestacy provisions to be the “backbone of *all* child status determinations” and that “Congress understood the Act’s framework as requiring *all* natural children to pass through § 416(h) to claim child status.”¹⁹⁶

Furthermore, the court determined that the SSA’s interpretation best comports with the purposes of the Act.¹⁹⁷ The court stated that “[t]he Act is not a welfare program generally benefiting needy persons, but rather an effort to provide the . . . *dependent* members of [a wage

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 55–56.

¹⁹⁴ *Id.* at 56–57.

¹⁹⁵ *Schafer*, 641 F.3d at 57.

¹⁹⁶ *Id.* at 58 (emphasis added).

¹⁹⁷ *Id.* (emphasis added).

earner's] family with protection against the hardship occasioned by his loss of earnings.”¹⁹⁸ The court recognized that the Act thus creates a “core beneficiary class”—“the children of deceased wage earners who relied on those earners for support”—and that “[t]he SSA’s interpretation, by tying natural child status determinations to one of § 416(h)’s pathways, [consequently] reflects the Act’s basic aim of primarily helping those children who lost support after the unanticipated death of a parent.”¹⁹⁹ Although the Fourth Circuit found that posthumously conceived children differ from the core beneficiary class—primarily in that they necessarily could not have relied on the decedent’s wages prior to his death²⁰⁰—the court noted that the SSA’s interpretation “properly includes as children those posthumously conceived children whom state lawmakers conclude are similarly situated enough to more traditionally conceived children that they deserve a share in the decedent's estate.”²⁰¹

Finding that Schafer’s interpretation contravened the Act’s purpose by threatening the core beneficiary class and that “[t]he text, legislative history, purpose, and prior judicial approaches to the Act” supported its conclusion, the court held that Congress intended for the SSA to use state intestacy law in determining child status and benefit eligibility.²⁰²

The court subsequently engaged in a *Chevron* step two analysis, inquiring as to whether the Act was silent or ambiguous with respect to the specific issue at bar and, if so, whether the SSA’s interpretation was based on a permissible construction of the statute.²⁰³ The court first determined that “[e]ven if one were to disagree that the Act dictates the SSA’s interpretation, the

¹⁹⁸ *Id.* (internal quotation marks and citations omitted) (emphasis added).

¹⁹⁹ *Id.*

²⁰⁰ The court specifically stated that posthumously conceived children differ from members of the core beneficiary class in two ways: “First, they necessarily could not have relied on the wage earner’s wages prior to his death. Second, they generally come into being after it is clear that one of the parents will not be able to support the child in the ordinary way during the child’s lifetime, meaning that the survivorship benefits would serve a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses.” *Id.* at 58–59.

²⁰¹ *Schafer*, 641 F.3d at 58–59.

²⁰² *Id.* at 59–60.

²⁰³ *Id.* at 60–61.

considerable evidence for the SSA’s view at least demonstrates statutory ambiguity.” Among other things, the court reasoned that “§ 416(h)(2)(A)’s clear instruction and comprehensive approach significantly undermines the view that § 402(d)’s basic grant and § 416(e)(1)’s sparse definition independently confer child status on undisputed children.”²⁰⁴

Because the court found the Act to be *at least* ambiguous, it stated that it could not disturb the decision of an agency at *Chevron* step two “unless it was arbitrary or capricious in substance, or manifestly contrary to the statute.”²⁰⁵ Explaining that “deference of this sort stands at the heart of modern administrative law” and that it “ensures that agency officials, who . . . possess greater relevant expertise than judges, take the lead in implementing programs delegated to their care,” the court held that the SSA’s interpretation of the Act easily passed muster under *Chevron*.²⁰⁶ The court reasoned that the SSA “has extensive experience in administering the Act’s survivorship benefits program, as well as the legal and practical ability to respond more quickly to changing regulatory circumstances.”²⁰⁷ The court further reasoned that the SSA “faces political checks from Congress and the President, likely keeping its policymaking within the bounds of the democratically acceptable.”²⁰⁸ Thus, the Fourth Circuit determined that, at least in the present case, it would be “well advised to leave the fine-tuning of statutory regimes to others.”²⁰⁹

In sum, the court—recognizing that “states have demonstrated a legislative willingness to account for the new biological world in which we find ourselves,” and that jettisoning the SSA’s approach would “thrust the federal courts into a myriad of other issues, including policy-driven questions about . . . child status”—held that it would not “disturb [the] long-lived effort at

²⁰⁴ *Id.* at 61.

²⁰⁵ *Id.* (internal quotation marks omitted).

²⁰⁶ *Id.*

²⁰⁷ *Schafer*, 641 F.3d at 61–62 .

²⁰⁸ *Id.* at 62.

²⁰⁹ *Id.*

federal-state cooperation, especially where the SSA's construction of the Act seems not only permissible, but also correct.”²¹⁰

d. Eighth Circuit: *Beeler v. Astrue*

Bruce and Patti Beeler were married in December 2000.²¹¹ Shortly before the wedding, however, Bruce was diagnosed with acute leukemia.²¹² Advised to undergo chemotherapy, but informed that such treatment could cause sterility, Bruce arranged to store his sperm at a fertility clinic so that he and his wife could later have children.²¹³

In February 2001, after being hospitalized for an infection, Bruce turned his attention to the disposition of his banked sperm.²¹⁴ Bruce signed a hospital form in which he bequeathed his sperm to Patti (or “Beeler”) and provided that only she could use the sperm in the event of Bruce’s death.²¹⁵ Bruce and Patti also signed a hospital form providing that the couple desired Patti to be inseminated with Bruce’s sperm for the purpose of conceiving a child, and that Bruce accepted and acknowledged paternity and child support responsibilities for any resulting child.²¹⁶ Two days after signing the forms, Bruce underwent a bone marrow transplant, which was unsuccessful.²¹⁷ Bruce passed away in May 2001.²¹⁸

Approximately one year after her husband’s death, Beeler conceived a child after undergoing intra-uterine insemination.²¹⁹ The child was born in April 2003.²²⁰ Bruce was listed as the father on the child’s birth certificate, and it was undisputed that the child was Bruce’s

²¹⁰ *Id.* at 62–63 (internal quotation marks and citations omitted).

²¹¹ *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 956–57.

²¹⁷ *Beeler*, 651 F.3d at 957.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

biological daughter.²²¹

In June 2003, Beeler applied for child's insurance benefits on behalf of her daughter.²²² However, the SSA ultimately denied the application as well as a request for reconsideration.²²³ Beeler subsequently requested a hearing before an ALJ.²²⁴

Following a hearing in March 2008, the ALJ sent the case to the SSA's Appeals Council with a recommendation that Beeler's child was not entitled to benefits.²²⁵ The Appeals Council, "based on its review and application of the Act, regulations, rulings, and acquiescence rulings," issued an decision determining that Beeler's child was not Bruce's "child" within the meaning of the Social Security Act and, therefore, was not entitled to benefits.²²⁶

In February 2009, Beeler sued the Commissioner of Social Security in district court, seeking a review of the SSA's denial of child's insurance benefits.²²⁷ The district court ultimately reversed the SSA's decision, remanding the case to the agency with instructions to calculate and award benefits to Beeler's child.²²⁸ The Commissioner subsequently appealed to the Eighth Circuit.²²⁹

Following a discussion regarding the history of the Social Security Act, its relevant provisions, and the criteria a child must satisfy in order to qualify for insurance benefits, the Eighth Circuit noted that it was undisputed that Bruce was fully insured at the time of his death; that an application for benefits had been filed on the child's behalf; and that the child was

²²¹ *Id.*

²²² *Id.*

²²³ *Beeler*, 651 F.3d at 957

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Beeler*, 651 F.3d at 957.

unmarried and under eighteen years old.²³⁰ The court also acknowledged that the parties had agreed that if Beeler’s child qualified as a “child” under any provision of section 416(h), she automatically satisfied the Act’s dependency requirement.²³¹

Observing that the parties’ dispute centered on the relationship between sections 416(e) and 416(h) of the Act, as well as various SSA regulations implementing those provisions, the court set forth the applicable standard of review.²³² The court stated that it would review the district court’s decision *de novo* and would affirm the Commissioner’s denial of benefits “if substantial evidence in the record as a whole support[ed] the decision, and the Commissioner correctly applied the relevant legal standards.”²³³ The court further stated that whether the SSA’s position—that section 416(h) “is the exclusive means by which an applicant can qualify for ‘child’ status as a natural child within the meaning of § 416(e)” —is correct is a question of statutory interpretation and would also be reviewed *de novo*.²³⁴

Like the Fourth Circuit, the court subsequently pointed out that “when Congress has delegated authority to an administrative agency to interpret and implement a federal statute,” the court gives “the agency’s interpretation deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*”²³⁵ Under *Chevron*, the court noted, an agency’s view “governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.”²³⁶

Noting that the Social Security regulations were established “pursuant to the Commissioner’s statutory authority to promulgate rules that are ‘necessary or appropriate to

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 959.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Beeler*, 651 F.3d at 959 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

²³⁶ *Id.* (internal quotation marks and citations omitted).

carry out’ his functions and the relevant statutory provisions,” the court began examining those SSA regulations pertaining to “child” status.²³⁷ The court specifically highlighted 20 C.F.R. § 404.355—entitled “Who is the insured’s natural child?”—which provides that “you may be eligible for benefits as the insured’s natural child if any of the following conditions is met.”²³⁸ That statement, the court noted, “is followed by a list of four conditions for ‘natural child’ status that closely track the statutory criteria for ‘child’ status in § 416(h)(2)(A), § 416(h)(2)(B), and § 416(h)(3).”²³⁹ The court observed that the regulations provide “different sets of qualifications for adopted children, stepchildren, grandchildren, and stepgrandchildren, who—unlike natural children—are not required to satisfy one of the relevant provisions of § 416(h).”²⁴⁰

The court next laid out the parties respective arguments. It noted that, in the Commissioner’s view, “the [SSA’s] regulations confirm that an applicant can qualify as a natural ‘child’ within the meaning of § 416(e) *only* by meeting one of the criteria outlined in § 416(h).”²⁴¹ In Beeler’s view, however, the relevant SSA regulation “does not exclude the possibility that ‘natural child’ status can be established by other means, such as an undisputed biological relationship,” because the “regulation says ‘you *may* be eligible for benefits as a natural child’ if certain conditions are met,” as opposed to stating that the four listed criteria are the exclusive means of acquiring “natural child” status.²⁴²

Finding no latent ambiguity, the court determined that the regulations “make clear that the SSA interprets the Act to mean that the provisions of § 416(h) are the *exclusive* means by which an applicant can establish ‘child’ status under § 416(e) as a natural child.”²⁴³ The court

²³⁷ *Id.* at 959–60 (citations omitted).

²³⁸ *Id.* at 960 (citing 20 C.F.R. § 404.355(a)).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Beeler*, 651 F.3d at 960 (emphasis added).

²⁴² *Id.*

²⁴³ *Id.* (emphasis added).

reasoned that it would not make sense for the SSA “to promulgate a regulation dedicated specifically to answering the key question—“Who is the insured’s natural child?”—and then to omit one prominent answer.”²⁴⁴ Furthermore, the court reasoned that the SSA used the phrase “*may be eligible*” for benefits because an applicant must also meet additional requirements with respect to dependency, age, and marital status in order to qualify for child insurance benefits.²⁴⁵ Citing Supreme Court precedent, the court also noted that, “[e]ven if there were a sliver of ambiguity in the regulations, an agency’s interpretation of its own ambiguous regulation is controlling unless plainly erroneous or inconsistent with the regulation.”²⁴⁶ Thus, according to the court, the Commissioner’s interpretation easily passed muster and was entitled to *Chevron* deference.²⁴⁷

Also finding that provisions of the agency’s policy manual did not conflict with the SSA’s longstanding position—that all children seeking benefits must attain “child” status “by satisfying the criteria outlined in § 416(h)(2)(A), § 416(h)(2)(B), or § 416(h)(3)” —the court next addressed whether the SSA’s interpretation of the statute was reasonable.²⁴⁸ The court concluded that “[t]he text of the statutes favors the Commissioner’s position.”²⁴⁹ The court reasoned that “[o]n its face, § 416(h)(2)(A) clearly directs the Commissioner to determine the status of a posthumously conceived child by reference to state intestacy law” and that the text “could hardly be more clear.”²⁵⁰

The court also rejected Beeler’s arguments that a biological child is necessarily a “child”

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 961.

²⁴⁶ *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) (internal quotation marks omitted).

²⁴⁷ *Beeler*, 651 F.3d at 962.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 963.

²⁵⁰ *Id.*

under section 416(e), and that section 416(h) was irrelevant to her child.²⁵¹ The court reasoned that although sections 416(e) and 416(h) do not refer to one another, and section 402(d)(1) “requires an applicant to qualify as a ‘child’ ‘as defined in section 416(e)’” without mentioning section 416(h), these points were “insufficient to establish unambiguously that a posthumously conceived biological child is necessarily a ‘child’ under § 416(e).”²⁵² This conclusion was fortified, the court said, because “Congress elsewhere required proof beyond undisputed biological parentage to obtain ‘child’ status under § 416(e),” such as in sections 416(h)(2)(B) and (h)(3)(C)(ii).²⁵³ Thus, the court concluded that if Beeler’s interpretation—that undisputed biological parentage alone is sufficient—were correct, “then the statutory provisions requiring more evidence in some cases would be superfluous.”²⁵⁴

Lastly, the court rejected the Ninth and Third Circuit’s reading of the Act’s legislative history, as well as Beeler’s argument that her child qualified as a “child” under section 416(h)(3)(C)(i)(I) of the Act.²⁵⁵

Finding that the Social Security Act permits, if not requires, the SSA’s interpretation, the court held that, as the law now stands, “it resolves the question of eligibility for child’s insurance benefits by reference to state intestacy law.”²⁵⁶ The court concluded that the Commissioner’s denial of child’s insurance benefits “was supported by reasonable construction of the governing statutes and regulations, and by substantial evidence on the record as a whole.”²⁵⁷ Thus, the district court’s decision was reversed.²⁵⁸

²⁵¹ *Id.*

²⁵² *Id.* (internal citation omitted).

²⁵³ *Beeler*, 651 F.3d at 963.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 964–66.

²⁵⁶ *Id.* at 966.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

V. The Letter of the Law

In the context of posthumously conceived children, the Social Security Act, as it is currently written, should be construed as requiring courts to look to state intestacy law to determine “child” status for purposes of benefit eligibility.

a. Why the Fourth and Eighth Circuits “Got It Right”

The Ninth Circuit, in *Gillett-Netting*, asserted that the Social Security Act “defines ‘child’ broadly to include any [natural or biological] ‘child or legally adopted child of an individual,’” and that the following subsections merely were “added to the Act to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute.”²⁵⁹ In fact, the court concluded that the sub-provisions have no relevance unless the child’s parentage is disputed.²⁶⁰

The Third Circuit, in *Capato*, reached the same conclusion.²⁶¹ The court held that, so long as the benefit applicant is the biological offspring of the deceased wage earner and his or her widow, “[t]he term “child” in § 416(e) requires no further definition.”²⁶²

The Ninth and Third Circuits’ interpretation, as the Supreme Court ultimately recognized,²⁶³ is flawed. It implies that, even in the present era of developing reproductive technologies, the meaning of the word “child” is so self-evident that courts do not need help interpreting it. This simply is not the case. Even in the limited context of biological children of validly married parents, where there supposedly is “no family status to determine,”²⁶⁴ “child” status remains a hotly contested issue. As even the Third Circuit acknowledged, “The use of

²⁵⁹ *Gillett-Netting v. Barnhart*, 371 F.3d 593, 596 (9th Cir. 2004), *abrogated by* *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

²⁶⁰ *Id.* at 596–97.

²⁶¹ *See generally* *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011), *rev’d and remanded sub nom.* *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

²⁶² *Id.* at 631.

²⁶³ *See* *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

²⁶⁴ *Capato*, 631 F.3d at 630.

donor eggs, artificial insemination, and surrogate wombs could result in at least five potential parents.”²⁶⁵

Furthermore, the Ninth and Third Circuits’ reading renders section 416(h) entirely superfluous.²⁶⁶ The Fourth Circuit presents perhaps the best illustration of this point, stating:

In § 416(h)(3)(C)(ii), Congress provided child status to a child who cannot inherit but who can prove *both* that the insured was the child’s parent and that the insured was ‘living with or contributing to’ the child at the time of death. But if undisputed biological parentage is enough under § 416(e)(1), it would have made no sense for Congress to require those whose parentage was initially disputed but was then resolved to prove something in addition to biological parentage.²⁶⁷

The court followed with a second illustration. It noted that section 416(h)(2)(B) of the Act “grants child status to a non-inheriting child only if he or she is the son or daughter of [the] insured—demonstrating that parentage is no longer in dispute—and if his or her parents went through a legally invalid marriage ceremony.”²⁶⁸ Clearly, if undisputed biological parentage alone were sufficient, the statutory provisions requiring additional criteria to be satisfied would be unnecessary.²⁶⁹

The Ninth and Third Circuits suggested that the class of children afforded “child” status by section 416(e)(1) is comprised specifically of the undisputed biological children of *married* parents.²⁷⁰ But this undermines the courts’ insistence that the plain English meaning of “child” drove their views, inasmuch as non-marital children are in fact children..²⁷¹ Thus, the Ninth and Third Circuits’ interpretation is incorrect and should be rejected.

While it is true that section 402(d) explicitly refers to section 416(e), not section 416(h),

²⁶⁵ *Id.* at 632; *see also* *Schafer v. Astrue*, 641 F.3d 49, 54–55 (4th Cir. 2011) (noting that “though modern technology makes determining biological parentage scientifically feasible, it also creates situations that illustrate the complexity of determining the meaning of ‘child’ today.”), *cert. denied*, 132 S. Ct. 2680 (2012).

²⁶⁶ *Capato*, 631 F.3d at 631 (“Our analysis does not render § 416(h) superfluous . . .”).

²⁶⁷ *Schafer*, 641 F.3d at 55.

²⁶⁸ *Id.* (citing 42 U.S.C. § 416(h)(2)(B)) (internal quotation marks omitted).

²⁶⁹ *Beeler v. Astrue*, 651 F.3d 954, 963 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

²⁷⁰ *Schafer*, 641 F.3d at 55.

²⁷¹ *Id.*

in defining “child,” and that neither subsection refers to the other, this dilemma is more apparent than real.²⁷² Indeed, as the Fourth Circuit asserted, “it is not at all unusual for Congress to refer explicitly only to one section even though some of that section’s terms are given their full import by another, unmentioned section.”²⁷³

As the Fourth Circuit noted, the term “child” lies at the heart of the Act’s benefit program.²⁷⁴ For that reason, it would be particularly startling if Congress failed to provide further guidance on the issue of “child” status than that set forth in section 416(e)(1).²⁷⁵ Thankfully, Congress did not leave courts in the dark about such a critical term. The plain text of section 416(h) provides all the guidance that is needed.

b. Section 416(h)(2)(A): The Primary, If Not Exclusive, Means By Which Posthumously Conceived Children May Qualify As “Children” Under the Act

As noted above, all children applying for child’s insurance benefits must satisfy one of the four criteria of section 416(h) in order to attain “child” status under the Act. However, the statute instructs courts to look *first* to state intestacy law in making “child” status determinations: “In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual . . . was domiciled at the time of his death”²⁷⁶

While sections 416(h)(2)(B) and (h)(3) of the Act also provide gateways to “child” status, courts may apply these provisions only after applying state intestacy law, according to the text of the statute. Section 416(h)(2)(B) states in relevant part, “If an applicant is a son or daughter of a fully or currently insured individual *but is not (and is not deemed to be) the child of such insured*

²⁷² *Id.* at 53–54, 56.

²⁷³ *Id.* at 56.

²⁷⁴ *Id.* at 54.

²⁷⁵ *Id.*

²⁷⁶ 42 U.S.C. § 416(h)(2)(A).

individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual” if certain conditions are met.²⁷⁷ The provision, among other things, provides alternative pathways for children to qualify as “children” under the Act, even if they lack inheritance rights under state intestacy law.

Similarly, section 416(h)(3) of the Act is to be applied only after both provisions of section 416(h)(2) have been tested. Among other things, the provision states, “An applicant who is the son or daughter of a fully or currently insured individual, *but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection*, shall nevertheless be deemed to be the child of such insured individual” if certain conditions are met.²⁷⁸

As the foregoing demonstrates, Congress clearly intended for the provisions of sections 416(h)(2) and (h)(3) to be applied in the order in which they appear in the statute. Nevertheless, and although a child technically can attain “child” status by satisfying *any* of the four criteria of section 416(h), section 416(h)(2)(A) may be the exclusive means by which posthumously conceived children can attain “child” status. As the Fourth Circuit pointed out, because the insured parent of a posthumously conceived child, by definition, died prior to the child’s conception, parentage could not have been acknowledged, decreed, or ordered prior to the insured wage earner’s death.²⁷⁹ Thus, it is impossible for a posthumously conceived child to attain “child” status under sections 416(h)(3)(C)(i)(I)-(III) of the Act. Likewise, because a posthumously conceived child—again, by definition—could not have been living with or receiving contributions from the decedent when the decedent passed away,²⁸⁰ it is impossible for

²⁷⁷ *Id.* § 416(h)(2)(B) (emphasis added).

²⁷⁸ *Id.* § 416(h)(3) (emphasis added).

²⁷⁹ *Schafer*, 641 F.3d at 53.

²⁸⁰ *Id.*

him or her to attain “child” status under section 416(h)(3)(C)(ii).

Although it theoretically is possible for a posthumously conceived child to attain “child” status pursuant to section 416(h)(2)(B)—as the child may be able to demonstrate (1) that parentage is undisputed, and (2) that his or her parents went through a legally invalid marriage ceremony—such a result is highly unlikely. Not only, as the Third Circuit observed,²⁸¹ might establishing undisputed parentage pose significant problems for posthumously conceived children, but twenty-first century marriage ceremonies in the U.S. rarely will be found to be legally invalid. Moreover, even in the rare instance where a posthumously conceived child can establish the required elements of section 416(h)(2)(B), that child still will have to satisfy the provisions of section 402(d), which itself is no easy task. Due to the difficulty a posthumously conceived child is likely to encounter in attempting to establish the criteria of sections 416(h)(2)(B) and 402(d), attaining “child” status pursuant to these provisions is highly improbable.

For the foregoing reasons, the Fourth and Eighth Circuits were correct to hold, as a matter of statutory interpretation, that the Act, as it currently is written, grants social security insurance benefits to posthumously conceived children *only if* they qualify as “children” under their respective state’s intestacy statutes.

VI. The Supreme Court Aligns with the Fourth and Eighth Circuits

Granting certiorari on the issue in November 2011, the United States Supreme Court, in May 2012, once and for all resolved the question of whether posthumously conceived children “rank as ‘child[ren]’ under the Act’s definitional provisions” in *Astrue v. Capato ex rel.*

²⁸¹ See *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 632 (3d Cir. 2011), *rev’d and remanded sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

*B.N.C.*²⁸² The case, on appeal from the Third Circuit and once again focusing on Mr. and Mrs. Capato’s posthumously conceived twins, was decided unanimously.²⁸³

Upon acknowledging that “[t]he technology that made the twins’ conception and birth possible . . . was not contemplated by Congress when the relevant provisions of the Social Security Act . . . originated (1939) or were amended to read as they now do (1965),” the Court aligned with the Fourth and Eighth Circuits and held that the SSA’s reading of the statute—entitling “biological children to benefits only if they qualify for inheritance from the decedent under state intestacy law, or satisfy one of the statutory alternatives to that requirement”—is “better attuned to the statute’s text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime.” The Court further held that “even if the SSA’s longstanding interpretation is not the only reasonable one, it is at least a permissible construction that garners the Court’s respect under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*”²⁸⁴

The Court reasoned that “[n]othing in § 416(e)’s tautological definition . . . suggests that Congress understood the word ‘child’ to refer only to the children of married parents,” and that “elsewhere in the Act, Congress expressly limited the category of children covered to offspring of a marital union.”²⁸⁵ Likewise, the Court noted that “marriage does not ever and always make the parentage of a child certain, nor does the absence of marriage necessarily mean that a child’s parentage is uncertain.”²⁸⁶

Rejecting the Third (and Ninth) Circuit’s interpretation, the Court further observed that section 416(e) fails to “indicate that Congress intended ‘biological’ parentage to be [a]

²⁸² 132 S. Ct. 2021 (2012).

²⁸³ *Id.* at 2025. For a detailed discussion of the facts and procedural history of the underlying case, *see generally* *Capato*, 631 F.3d 626.

²⁸⁴ *Astrue*, 132 S. Ct. at 2026.

²⁸⁵ *Id.* at 2029–30.

²⁸⁶ *Id.* at 2030.

prerequisite to ‘child’ status,” and that “laws directly addressing use of today’s assisted reproduction technology do not make biological parentage a universally determinative criterion.”²⁸⁷ Nevertheless, the Court added that even if it were to accept Capato’s proposed definition—“biological child of married parents”—it is far from obvious that Capato’s posthumously conceived twins would be covered.²⁸⁸ Indeed, “[u]nder Florida law, a marriage ends upon the death of a spouse,” the Court noted.²⁸⁹ Thus, “[i]f that law applie[d], rather than a court-declared preemptive federal law, the Capato twins, conceived after the death of their father, would not qualify as ‘marital’ children.”²⁹⁰

With respect to how section 416(h)(2)(A)’s instructions fit into the “child” status analysis, the Court reiterated Capato’s argument that section 416(e) lacks any cross-reference to section 416(h).²⁹¹ The Court, however, emphasized that Capato “overlooks . . . that § 416(h) provides the crucial link.”²⁹² The Court stated that

[t]he ‘subchapter’ to which § 416(h) refers is Subchapter II of the Act, which spans §§ 401 through 434. Section 416(h)’s reference to ‘this subchapter’ thus includes both §§ 402(d) and 416(e). Having explicitly complemented § 416(e) by the definitional provisions contained in § 416(h), Congress had no need to place a redundant cross-reference in § 416(e).²⁹³

Accordingly, the Court concluded that “[r]eference to state law to determine an applicant’s status as a ‘child’ is anything but anomalous.”²⁹⁴ Just the opposite, “[t]he Act commonly refers to state law on matters of family status.”²⁹⁵ The Court discovered that “as originally enacted, a single provision mandated the use of state intestacy law for ‘determining whether an applicant is

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* (citation omitted).

²⁹⁰ *Astrue*, 132 S. Ct. at 2030.

²⁹¹ *Id.* at 2031.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

the . . . child . . . of [an] insured individual.”²⁹⁶ Similarly, the Court explained that “requiring all ‘child’ applicants to qualify under state intestacy law installed a simple test, one that ensured benefits for persons plainly within the legislators’ contemplation, while avoiding congressional entanglement in the traditional state-law realm of family relations.”²⁹⁷

The Court also emphasized that “[t]he paths to receipt of benefits laid out in the Act and regulations . . . proceed from Congress’ perception of the core purpose of the legislation.”²⁹⁸ The Act’s aim, the court noted, “was not to create a program ‘generally benefiting needy persons’; it was, more particularly, to ‘provide . . . dependent members of [a wage earner’s] family with protection against the hardship occasioned by [the] loss of [the insured’s] earnings.’”²⁹⁹ Thus, according to the Court, “[r]eliance on state intestacy law to determine who is a ‘child’ . . . serves the Act’s driving objective.”³⁰⁰ To be sure, the court acknowledged, “the intestacy criterion yields benefits to some children outside the Act’s central concern.”³⁰¹ Nonetheless, it was “Congress’ prerogative to legislate for the generality of cases.”³⁰²

Additionally rejecting Capato’s Equal Protection claim,³⁰³ the Supreme Court held that section 416(h)(2)(A) . . . completes the definition of ‘child’ “for purposes of th[e] subchapter” that includes § 416(e)(1).”³⁰⁴ The Court further concluded that “[t]he SSA’s interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable,” and, therefore, the agency’s reading—which the Court found to be neither arbitrary nor capricious—

²⁹⁶ *Astrue*, 132 S. Ct. at 2031.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 2032.

²⁹⁹ *Id.* (citation omitted).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Astrue*, 132 S. Ct. at 2032.

³⁰³ The Court held that “[u]nder rational-basis review, the regime Congress adopted easily passes inspection.” *Id.* at 2033. The Court reasoned that the “regime is ‘reasonably related to the government’s twin interests in [reserving] benefits [for] those children who have lost a parent’s support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis.’” *Id.* (citations omitted).

³⁰⁴ *Id.*

“is . . . entitled to th[e] Court’s deference under *Chevron*.”³⁰⁵ The Court thus reversed the Third Circuit’s ruling.³⁰⁶

VII. Beyond the Letter of the Law

The Fourth and Eighth Circuits, as well as the Supreme Court, have construed the Social Security Act as it currently is written correctly. That is, as a matter of statutory interpretation, the Act technically should be interpreted as requiring courts to look to state intestacy law to determine “child” status. Nevertheless, and notwithstanding the foregoing, this article contends that the statute is poorly drafted and fundamentally inconsistent with the legislative purpose underlying the Act’s passage.

As courts have recognized, the Social Security Act of 1935 was never intended to be a “welfare program generally benefiting needy persons,”³⁰⁷ but rather an effort to tackle head on the burgeoning problem of economic security for the elderly.³⁰⁸ Based primarily, if not exclusively, on the concept of *social insurance*, this contributory system—like many social insurance programs—was intended to provide economic security by “pooling risk assets from a large social group and providing income to those members of the group whose economic security [was] imperiled . . . by . . . cessation of work due to old age.”³⁰⁹

Although the Act was amended in 1939, expanding both coverage and benefits to retired workers, their spouses and children, and to survivors,³¹⁰ the amendments’ purpose was *not* to provide general welfare benefits to the public,³¹¹ but to function as an insurance policy,

³⁰⁵ *Id.* at 2033–34.

³⁰⁶ *Id.* at 2034.

³⁰⁷ *Schafer v. Astrue*, 641 F.3d 49, 58 (4th Cir. 2011) (citing *Califano v. Jobst*, 434 U.S. 47, 52 (1977)), *cert. denied*, 132 S. Ct. 2680 (2012); *see also Astrue*, 132 S. Ct. at 2032 (citation omitted).

³⁰⁸ MARGARET C. JASPER, *SOCIAL SECURITY LAW* 4 (2d ed. 2004).

³⁰⁹ *Id.*

³¹⁰ ABRAHAM & KOPELMAN, *supra* note 45, at 3.

³¹¹ *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 629 (3d Cir. 2011) (citing *Jones ex rel. Jones v. Chater*, 101 F.3d 509, 514 (7th Cir. 1996)) (internal quotation marks omitted); *see also* ABRAHAM & KOPELMAN, *supra* note 45, at 4 (noting that the social security program of benefits differs from welfare in at least two respects).

providing “protection to the [American] worker and to [dependent members of] his family against the loss of earning because of retirement . . . or death.”³¹² With respect to child’s insurance benefits specifically, the 1939 amendments sought to replace the support that a dependent child would have received from his or her parent had the parent not died.³¹³ The drafters thus created a core beneficiary class: the children of deceased wage earners who *depended* on those earners for support.³¹⁴

While the Ninth and Third Circuits’ interpretation of the Act undoubtedly covered the members of this core beneficiary class, their approach, as the Fourth and Eighth Circuits observed, was over-inclusive and, therefore, overshot the legislative purpose underlying the Act’s passage. As noted above, child’s insurance benefits were added to the Act not to provide general welfare assistance or subsidize parents’ decision to reproduce, but “to provide support to children who have lost ‘actual’ or ‘anticipated’ support.”³¹⁵ The Act’s underlying purpose thus suggests that all benefit applicants should be required to demonstrate a level of *actual dependency* on the wage earner as a prerequisite to benefits.

However, while “regularly-conceived,” biological children of married parents likely can satisfy this prerequisite—as they are alive prior to the wage earner’s death and, therefore, likely were dependent on the wage earner—the same cannot be said about posthumously conceived children. As the Fourth Circuit aptly noted, posthumously conceived children, by definition, are not in existence at the time of the wage earner’s death and, therefore, “necessarily could not have

First, “benefits are paid only on the basis of work and earnings to individuals who have worked and earned and to their dependents and survivors.” Second, “benefits are based on the amount of earnings, whether from covered employment or covered self-employment . . . Need plays no part in determining eligibility for, or amount of, benefits.”).

³¹² ABRAHAM & KOPELMAN, *supra* note 45, at 4.

³¹³ *Capato*, 631 F.3d at 629 (citing *Jones ex rel. Jones v. Chater*, 101 F.3d 509, 514 (7th Cir. 1996)) (internal quotation marks omitted); *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011) (“The Social Security Act authorizes the payment of benefits to the *dependent* children of deceased workers.”) (emphasis added).

³¹⁴ *Schafer v. Astrue*, 641 F.3d 49, 58 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

³¹⁵ *Capato*, 631 F.3d at 629 (citing *Adams v. Weinberger*, 521 F.2d 656, 659 (2d Cir. 1975)).

relied on the wage earner's wages.”³¹⁶ By awarding “child” status to *any* undisputedly biological child of married parents and automatically deeming these “legitimate” children *dependent*, the Ninth and Third Circuits’ interpretation, as the Fourth and Eighth Circuits observed, overlooked this critical point. Indeed, overextending coverage to children outside the core beneficiary class, such as posthumously conceived children, treats child’s insurance benefits more akin to subsidies for parents’ reproductive plans or general welfare assistance than insurance for unexpected losses. It therefore ignores the drafters’ aim of providing benefits primarily to those “who depended on the support of a wage-earner and lost that support due to the wage-earner’s death.”³¹⁷

While the Supreme Court’s (and the Fourth and Eighth Circuits’) “solution” to this dilemma has been to interpret the Act as requiring benefit applicants to satisfy one of the provisions outlined in section 416(h) in order to claim “child” status, this approach, while perhaps correct as a matter of statutory interpretation, and certainly effective in reducing the number of eligible applicants, also is inconsistent with the Act’s legislative purpose, particularly in the context of posthumously conceived children.

Indeed, section 416(h)(2)(A), which is the primary, if not exclusive, means by which posthumously conceived children can qualify as “children” under the Act, does not make the benefit applicant’s level of *actual dependency* on the deceased wage-earner, or lack thereof, the focal point of its inquiry. Instead, the provision relies on state intestacy statutes in making “child” status determinations. While this approach may provide a definitive answer as to whether or not an applicant is entitled to benefits—or at least an analytical framework to apply in making this determination—it is problematic. In addition to the fact that intestacy laws may

³¹⁶ *Schafer*, 641 F.3d at 58–59.

³¹⁷ *Capato*, 631 F.3d 628 n.1.

differ in every state,³¹⁸ leaving the decision as to whether or not benefit applicants attain benefits to state legislatures, the statutes are intended to reflect the presumed intent of a decedent who has not had an opportunity to draw up a will,³¹⁹ not the policies underlying the Social Security Act and child's insurance benefits. The statutes thus do not consider whether a child was *actually dependent* on the decedent's earnings. As a result, a child who actually was dependent on the decedent but could not inherit pursuant to the intestacy laws of the state in which the wage earner died automatically may be denied financial support, contrary to the drafters' aim of helping children who lost support after the unanticipated death of a parent. To be sure, sections 416(h)(2)(B) and (h)(3) of the Act attempt to address this problem and increase the number of applicants who are eligible for child's insurance benefits. However, for many of the reasons articulated by the Ninth and Third Circuits,³²⁰ even these provisions are lacking.

Likewise, by relying on the presumed intent of the decedent, which intestacy laws seek to replicate, section 416(h)(2)(A) and the Supreme Court's and Fourth and Eighth Circuits' approach treats child's insurance benefits not as what they are—insurance against the loss of actual or anticipated support due to a wage earner's death—but rather as assets to be given away or withheld. For this reason, the courts' approach, again, is inconsistent with the Act's legislative purpose. Through taxes paid while employed, a wage earner essentially purchases an insurance policy, providing income for his dependents whose economic security is threatened by cessation of work due to his old age or death. Upon the wage earner's death, his dependent children, as beneficiaries of the wage earner's death proceeds, are thus *entitled* to benefits—a

³¹⁸ DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 72 (8th ed. 2009). The intestacy laws of different states may treat similarly situated children differently for "child" status purposes. For example, while a child in State A may be entitled to child's insurance benefits under the Act because his state's intestacy law provides for posthumously conceived children, a similarly situated child in State B may *not* be entitled to such benefits because his state's intestacy laws do not provide for posthumously conceived children.

³¹⁹ DUKEMINIER ET AL., *supra* note 318, at 75 (noting that the primary policy underlying intestacy statutes is to carry out the probable intent of the average intestate decedent).

³²⁰ See *supra* Part IV(a)–(b).

fact that many intestacy statutes may not consider.

Like the Ninth and Third Circuits' approach, the Supreme Court's and Fourth and Eighth Circuits' interpretation of the Act declines to make the benefit applicant's level of *actual dependency* on the deceased wage-earner, or lack thereof, the focal point of the courts' inquiry. However, this is not the courts' fault. Indeed, the Fourth and Eighth Circuits, as well as the Supreme Court, as a matter of statutory interpretation, have construed the Social Security Act as it currently is written correctly. The real issue—and this article's central point—is that the statute is poorly drafted and fundamentally inconsistent with the legislative purpose underlying the Act's passage.

VIII. A Plea for Congress to Amend the Social Security Act So That It Is More Consistent with the Act's Legislative Purpose and Clearer for Courts Tasked with Interpreting It in the Context of Posthumously Conceived Children.

If the goal of Congress is to grant posthumously conceived children child's insurance benefits *and* produce a statute that is consistent with the legislative purpose underlying its passage, the present text of the statute is inadequate. As discussed above, the American social security system was based primarily, if not exclusively, on the theories of social insurance and *dependency*. It, therefore, is only fitting that *dependency* lie at the core of any proposed solution Congress chooses to implement.

One potential dependency-based solution, which would resolve the issues surrounding posthumously conceived children's right to child's insurance benefits, would require Congress to adopt and implement a statutory provision premised on a theory of *vicarious dependency*.³²¹

³²¹ While the concept of "vicarious dependency" does not seem to appear elsewhere in the law, a similarly named but largely unrelated theory has come up in the sociology context. See, e.g., Clara Sabbagh, *The Dimension of Social Solidarity in Distributive Justice*, 42 SOC. SCI. INFO. 255 (2003)

[I]n relations of *vicarious dependency*, an individual can enable the other to attain the desired resource, that is, the individual delegates (or is expected to delegate) the resource to the other. An example of such a relationship is the investment parents put into a child and their sense of participation in the achievements associated with the investment. In such relations, the distance from the other is minor, if not non-existent; the other is perceived as "me", resulting in a sense of identification and empathetic involvement towards the

Under this proposal, eligibility for child's insurance benefits could be defined under section 402(d)(1)(C) as follows:

“Every child biologically or legally related to an individual entitled to old-age or disability insurance benefits, or to an individual who dies a fully insured individual, if such child . . . was dependent *or vicariously dependent* upon such individual . . . shall be entitled to a child's insurance benefit...”

Such a provision not only provides for most, if not all, of the “regularly-conceived” children currently provided for under sections 416(e) and (h) of the Act, it also allows posthumously conceived children to establish “dependency” and qualify for child's insurance benefits without having to rely on inconsistent state intestacy laws, which may or may not allow for benefits. The *vicarious dependency* provision accomplishes this result by automatically deeming a posthumously conceived child “dependent” on the deceased wage earner if that child's surviving parent or legal guardian can establish that he or she was financially dependent on the deceased wage-earner at the time of his or her death. For example, if it can be established that a deceased wage-earner is the biological or legal father of a posthumously conceived child, that child would be entitled to child's insurance benefits if his or her surviving mother can establish that she was financially dependent on the deceased wage-earner at the time of his death.³²² The fact that the child itself was not dependent on the wage-earner at the time of his death thus becomes irrelevant.

While there are, perhaps, several problems with this proposal—for example, the posthumously conceived child of unmarried parents *may* not qualify for child's insurance

other. In addition, each participant in the relationship largely depends on the other for attaining the resources. In conditions of mutual care, the potential conflict over resources ideally tends to be minimized or cancelled, since self-interests are identical to the interests of the other. The principle of need is appropriate in relations of vicarious dependency since one individual feels identical to the other and, in enabling the other to attain the desired resources, enhances both his or her own and the other's sense of welfare. Typical examples here are relations between parents and children or between spouses.

Id. at 264.

³²² Where the posthumously conceived child's biological parents were married prior to the death of the insured wage-earner, the surviving spouse almost always will be able to establish dependency.

benefits because his or her surviving parent may not have been financially dependent on the deceased wage earner at the time of his or her death³²³—there are also many benefits. For instance, the proposed solution makes the Act easier for courts to interpret and apply by eliminating a multitude of unnecessary and arguably conflicting sub-provisions. In addition, by disregarding the written intent of the insured, i.e., instances where the decedent gave written consent to the use of his sperm, as well as state intestacy statutes—statutes that supposedly reflect the presumed intent of a decedent who has not had the opportunity to draw up a will, but do not reflect the policies and purposes underlying social security benefits—the proposal treats child’s insurance benefits as what they are, *insurance* for dependent children of deceased wage earners, rather than an asset to be given away or withheld.

The proposal also protects a greater number of posthumously conceived children, as eliminating reliance on state intestacy law and permitting “dependency” to be satisfied vicariously undoubtedly affords more children access to benefits. To be sure, children conceived with the egg/sperm of a deceased, anonymous donor likely would not be eligible for benefits, but this is consistent with the legislative purpose underlying the Act’s passage. Not only does denial of benefits in these instances prevent Social Security from becoming a general welfare system, it declines to award benefits where there was no expectation of support.³²⁴ What’s more, there still is likely to be a net increase in the number of posthumously conceived children who are eligible for benefits, even if *some* posthumously conceived children may be excluded.

³²³ Another potential problem lies in the fact that spouses often depend on each other for non-financial reasons. Perhaps most notably, spouses often are dependent on the labor and/or emotional support provided by the other. For example, if one spouse is working and the other spouse is taking care of the house and children, the working spouse technically depends on the other’s *services*. Indeed, if the home-making spouse were to die, the working spouse would have to pay for child care, house-keeping, etc. Nevertheless, because (at least in this hypothetical) the working spouse almost certainly did not *financially* depend on the home-making spouse, the couples’ posthumously conceived child—in the event the working spouse dies—likely would not be eligible for child’s insurance benefits.

³²⁴ Under the proposal, and according to the Act’s legislative purpose, there can be no expectation of support where neither the child conceived with the egg or sperm of a deceased anonymous donor nor his or her surviving parent can possibly establish dependency on the decedent.

Lastly, the proposal expands the definition of “family” to include non-traditional groups, which are becoming increasingly common in the twenty-first century. For instance, the proposal allows a child to attain child’s insurance benefits regardless of whether he or she is conceived after the death of a parent, the biological child of a member of a same-sex marriage or civil union, or legally adopted, so long as he or she can establish actual or vicarious dependency on the deceased wage earner. The proposal thus recognizes and supports the non-nuclear family. At a time when “modern artificial reproduction technologies currently allow for variations in the creation of child-parent relationships which are not solely dependent upon biology” and “the use of donor eggs, artificial insemination, and surrogate wombs could result in at least five potential parents,”³²⁵ this is particularly important. Moreover, it is consistent with the Act’s remedial and humanitarian aims.³²⁶

Although there likely are many ways to amend the Social Security Act to make it clearer for courts tasked with interpreting it in the context of posthumously conceived children, a dependency-based amendment best comports with and reflects the legislative purpose underlying the Act’s passage. For this reason, this article recommends that Congress adopt and implement a statutory provision based on a theory of vicarious dependency. Not only would such a provision render the Social Security Act easier to interpret and apply, it would also protect a greater number of posthumously conceived children, support non-traditional families, and deny benefits where no expectation of support exists.

IX. Conclusion

Although the Supreme Court has now resolved the question of whether posthumously conceived children are entitled to child’s insurance benefits under the Social Security Act and

³²⁵ *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 632 (3d Cir. 2011), *rev’d and remanded sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

³²⁶ *Id.* at 629 (citing *Eisenhauer v. Mathews*, 535 F.2d 681, 686 (2d Cir. 1976)).

how that determination is made, this issue sharply divided the U.S. Courts of Appeal for several years. This should come as no surprise, however, given the Act’s ambiguity and the fact that many present-day reproductive technologies “were not within the imagination, much less the contemplation, of Congress when the relevant sections of the Act came to be.”³²⁷ While the Supreme Court ultimately deemed the Fourth and Eighth Circuits’ interpretation of the Act—awarding “child” status to benefit applicants only if they can satisfy one of the criteria outlined in section 416(h)—correct as a matter of statutory interpretation, it is clear that neither the Ninth and Third Circuits’ nor the Fourth and Eighth Circuits’ interpretation of the Act is entirely consistent with the legislative purpose underlying the Act’s passage. For this reason, Congress, which has the last word in determining the scope of survivorship benefits, should intervene, amending the Social Security Act so that it both corresponds with the Act’s legislative purpose and is clearer for courts tasked with interpreting it in the context of posthumously conceived children. While Congress perhaps can accomplish this goal in many ways, adopting a dependency-based approach, such as a theory of vicarious dependency, would seem to comport best with the Act’s legislative purpose. In any event, Congress should act promptly to ensure that posthumously conceived children—like “regularly-conceived” children—are adequately provided for.

³²⁷ *Id.* at 627.